



August 7, 2000

Ms. Cynthia B. Garcia
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street
Fort Worth, Texas 76102

OR2000-2988

Dear Ms. Garcia:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 138131.

The City of Fort Worth (the "city") received a request for "all public information" concerning three properties described by the requestor, and "information regarding all landfills previously owned or operated by the [city], whether still existing or not." The request also encompasses twenty-six specific categories of information, related to the above. You have submitted for our review a representative sample of responsive information.¹ You assert that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.103, the "litigation exception," excepts from disclosure information relating to litigation to which a political subdivision of the state is or may be a party. *See* Gov't Code § 552.103. Section 552.103 was intended to prevent the use of the Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-1048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990). Generally, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982).

¹In reaching our conclusion here, we assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988); 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Additionally, the applicability of section 552.103 ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103 exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990).

As to the first prong of the above-stated test, you have demonstrated that litigation is pending in the matter of *James S. Dubose v. The City of Fort Worth, Texas*, cause number 17-180555-99, in the 17th Judicial District Court, Tarrant County, Texas.² As to the second prong of the above-stated test, the governmental body must identify the issues in the litigation and explain how the requested information relates to those issues. Open Records Decision No. 551 at 5 (1990). You have provided this office a copy of the plaintiff's original petition, a copy of the plaintiff's first amended petition, and a copy of the city's original answer. You have also explained the primary issues in the litigation. Upon review of the submitted materials, your comments, and the submitted samples, we believe that you have demonstrated for purposes of section 552.103 that the requested information relates to the pending litigation. Thus, except as otherwise noted herein, we find that the city may withhold the responsive information from the requestor pursuant to section 552.103.

Despite the applicability of section 552.103, we note that some of the responsive information is nevertheless not excepted from required public disclosure. We specifically refer you to section 552.022 of the Government Code, which provides in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter *unless they are expressly confidential under other law*:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

²Because you advise that suit was filed on October 14, 1999, you have demonstrated that litigation was pending on the date that the city received the present request. See Gov't Code § 552.103(c).

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Gov't Code § 552.022 (emphasis added). With regard to the public release of the responsive information, you do not assert the applicability of any "other law" that makes the information confidential, nor do we find any provision of law that makes confidential any of the submitted samples. We note that section 552.103 of the Government Code is a discretionary exception under the Act and thereby does not constitute "other law" that makes information confidential. Thus, we conclude that those portions of the responsive information that are subject to the categories listed under section 552.022 of the Government Code are not excepted from disclosure in this instance and must be released in accordance with that provision.³

As for the submitted samples, and as explained above, we have marked for release certain change orders, which we understand are made part of the contract and are therefore subject to section 552.022(a)(3).⁴ We have also marked for release a report from Southwestern Laboratories and a report from the Texas Natural Resource Conservation Commission, both of which are indicated to comprise completed reports made for the city and therefore subject to section 552.022(a)(1).⁵ Additionally, we have marked for release a piece of correspondence indicated to comprise a completed cost estimate that is therefore subject to

³We note, for example, that the submitted samples do not include any minutes from public meetings although the request specifically encompasses such information (*see, e.g.*, items 2 and 10-20 of the request). We believe that existing minutes of public meetings that are responsive to the present request would be subject to release to the requestor as information that falls within section 552.022(a)(15) of the Government Code. *See* Gov't Code § 552.022(a)(15)(information regarded as open to the public under an agency's policies).

⁴These documents are marked with yellow flags. Although the submitted samples contain no contract, the city's submission to this office of change orders indicates that at least one related contract exists. Given the broad nature of the request and the fact that you have submitted change orders as part of the representative sample of responsive information, we believe the contract or contracts to which the change orders pertain also constitute information that is responsive to the request. Open Records Decision No. 561 at 8 (1990) (governmental body must make good faith effort to relate a request to information held by it).

⁵We have marked the reports with green flags.

section 552.022(a)(5).⁶ We find that the remaining samples may be withheld under section 552.103.

In summary, except where section 552.022 of the Act applies to the information, and except as provided above with reference to the limited applicability of the litigation exception, we conclude that the city may withhold the requested information pursuant to section 552.103 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

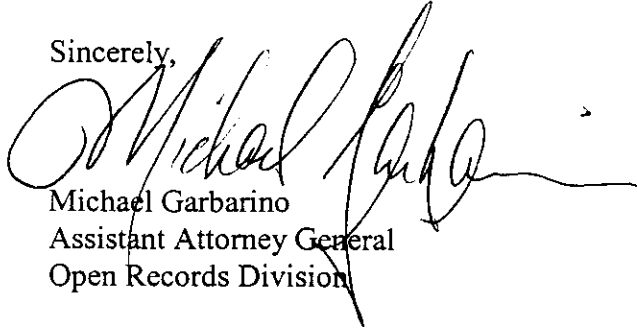
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

⁶We have marked the document with a blue flag.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Garbarino", is written over the typed name and title.

Michael Garbarino
Assistant Attorney General
Open Records Division

MG/pr

Ref: ID# 138131

Encl. Submitted documents

cc: Mr. John Harvey
Shannon, Gracey, Ratliff & Miller
777 Main Street, Suite 1500
Fort Worth, Texas 76102
(w/o enclosures)